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213-112—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

UNIVERSAL-RUNDLE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix B, *infra,* pp. 4a–12a) is reported at 352 F. 2d 831.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1965 (Appendix B, *infra,* p. 13a). A timely petition for rehearing and for rehearing *en banc* was denied on December 17, 1965 (Appendix B, *infra,* p. 15a). On March 17, 1966, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including April 16, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by postponing the operation of a Federal Trade Commission cease-and-desist order without passing on its validity, for the stated purpose of requiring the Commission to investigate the trade practices in question on an industry-wide basis.

STATUTES INVOLVED

The pertinent provisions of Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, and Section 11 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1127, and by the Finality Act of 1959, 73 Stat. 243, 15 U.S.C. 21, are set out in Appendix A, *infra,* pp. 1a–3a.

STATEMENT

Respondent, the manufacturer of "U–R" brand plumbing fixtures, which it sells and distributes throughout the United States (R. 15–17),[1] maintains two prices on all these fixtures: a wholesale net price and a truckload price which, on individual items, is from 5 percent to 15 percent lower (R. 17–20).[2] In a complaint issued on August 4, 1960 (R. 1–3), the Fed-

[1] "R." refers to the "Appendix to Brief for Petitioners" filed by Universal-Rundle in the court below.

[2] Because a truckload purchase may consist of any combination of fixtures, the resulting discounts for each purchase vary from order to order (R. 16, 38–40, 145–146, 187). On the average, the discounts equal about 10 percent (R. 43).

eral Trade Commission charged that these truckload discounts violated Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a) (Appendix A, *infra*, p. 1a). After an evidentiary hearing (R. 76–491) and cross-appeals from the Hearing Examiner's initial decision (R. 12–28), the Commission on June 12, 1964, found that the effect of the price discrimination resulting from respondent's truckload discounts may be substantially to lessen competition among respondent's customers (R. 44) [3] and issued a cease-and-desist order (R. 29).

On July 20, 1964, respondent petitioned the Commission to stay its order (R. 46–53), alleging for the first time that the granting of truckload discounts was an industry-wide practice.[4] The petition further alleged that, unless a stay were granted, respondent would operate under a "competitive disadvantage and extreme hardship" and probably would suffer "a substantial decline in * * * sales volume" (R. 47). Appended to this petition were (1) an affidavit of respondent's vice-president stating his belief that certain of respondent's competitors were also granting truckload discounts (R. 54–56), (2) the price lists of respondent's six leading competitors and summaries pre-

[3] Respondent also manufactures "Homart" brand plumbing fixtures, which it sells exclusively to Sears, Roebuck & Co. A charge that respondent was illegally discriminating in favor of Sears was dismissed by the Commission (R. 28–29) and is not involved here.

[4] In its answer to the complaint, respondent alleged that any lower prices it gave to favored customers "were given in good faith to meet competition" (R. 7), but it did not develop this defense during the proceedings.

pared therefrom, and (3) Dun and Bradstreet reports on these firms.[5]

On August 4, 1964, the Commission denied respondent's petition. It explained that, contrary to respondent's assumption that the Commission had found truckload discounts unlawful *per se*, the legality of discount practices depends upon the determination in each case "whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anticompetitive effects" (R. 63). It also noted that account must be taken in each case of statutory justifications given by the seller. Viewing respondent's assertions in the light of these considerations, the Commission concluded that "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter" (R. 63).

Respondent petitioned the court of appeals for review of both the Commission's cease-and-desist order and its order denying the stay. The court, without deciding the merits, set aside the denial of the stay.

[5] We are lodging respondent's petition and its appended exhibits (the latter were not printed in the appendix filed in the court below) with the Clerk of this Court.

Relying on the allegations in respondent's petition for a stay and its accompanying affidavit, the court found that the Commission had adopted an "inequitable approach" to "an industry-wide problem" by proceeding against "a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted" (Appendix B, *infra*, p. 9a). The court ruled that the Commission had a "duty * * * to bring into the case before it [respondent's] powerful competitors" (Appendix B, *infra*, p. 11a) and that this duty was not satisfied or excused by the other investigations which were pending at the time the case reached the court of appeals.[6] Accordingly, the court held that the Commission's denial of a stay was a "patent" abuse of discretion within the meaning of *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (Appendix B, *infra*, pp. 9a, 10a), and remanded the case to the Commission for further proceedings (Appendix B, *infra*, pp. 11a–12a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with and misapplies this Court's decision in *Moog Industries, supra*. In that case, this Court held that the question whether Commission orders "should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide"

[6] The Commission had informed the court that it was conducting an investigation of one of respondent's major competitors, which, while instituted for other reasons, could well reveal violations of Section 2(a), and that the Antitrust Division of the Department of Justice was conducting an investigation with which an industry-wide investigation by the Commission would conflict.

(355 U.S. at 413–414). Recognizing that "in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment," the Court stated (*id.* at 413):

> * * * Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to * * * whether or not the nature of * * * competition [in the relevant industry] is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, *although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency.* It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. * * * [Emphasis supplied.]

Thus, the Court concluded, the Commission's discretionary determination not to stay the effectiveness of a particular order may "not be overturned in the absence of a *patent* abuse of discretion" (*id.* at 414; emphasis supplied).

The Commission's refusal in this case to stay the order against respondent plainly was not a "patent abuse of discretion." Although respondent contended before the Commission that the entire industry was granting similar unlawful truckload discounts, it offered no evidence that competitors actually discriminated in price between competing customers.[7] Nevertheless, the Commission carefully considered respondent's petition. Explaining that truckload discounts were not unlawful *per se* and pointing out that respondent had not shown that its competitors' pricing practices caused competitive injury, the Commission reasonably concluded that respondent's contentions were insufficient to require it to postpone the order until it

[7] The court of appeals' premise—that unlawful price discrimination was an industry-wide practice of which respondent's larger competitors were "more guilty" than it (see Statement, *supra*, p. 5)—is not supported by respondent's petition for a stay. Not only does the petition fail to establish the illegality of competitors' prices, but the exhibits attached thereto reveal that, while respondent grants truckload discounts on its full line of fixtures in any combination (see Appendix B, *infra*, pp. 4a–5a), every other manufacturer referred to grants truckload prices on only a few specified items. Nor does the record support the court's statement that respondent is a "comparatively small manufacturer" in an industry "limited to a few" (Appendix B, *infra*, p. 9a). Respondent admitted that its market share figure of 5.75% (on the basis of which it ranked itself sixth in the industry) does not include its sales to Sears (R. 50 and n. 5). In addition to the six competitors whose price lists were attached to respondent's petition for a stay, at least eleven small plumbing fixture manufacturers are mentioned in the record (R. 435, 457), and, according to the Bureau of the Census, the industry is composed of at least 68 companies. United States Department of Commerce, Bureau of the Census, *Current Industrial Reports, Plumbing Fixtures*, Second Quarter 1965, September 9, 1965.

conducted an industry-wide proceeding (see Statement, *supra,* p. 4). Its decision not to institute such a proceeding was precisely the kind of "discretionary determination by the administrative agency" which this Court held in *Moog* was not subject to judicial reexamination (355 U.S. at 413). The Commission's decision in the present case was in accord with its settled practice of examining each application for a stay such as that filed by respondent in light of the circumstances of the particular case.[8]

Respondent in this case made a weaker claim before the Commission than that which this Court in *Federal Trade Commission* v. *C. E. Niehoff & Co.,* 355 U.S. 411, reversing 241 F. 2d 37 (C.A. 7), decided with *Moog,* found insufficient to justify the court of appeals in staying the agency's order. In *Niehoff,* the Court reversed the Seventh Circuit's stay of the Commission's order, holding that the Commission's denial of a stay was not a "patent abuse of discretion," despite Niehoff's claim that it "would have to go out of business" if the Commission's order became effective (355 U.S.

[8] The Commission's records show that since January 1, 1964, there have been at least eleven other cases, including five under the Robinson-Patman Act, in which the Commission has denied applications for stays such as respondent's. In some of these cases the Commission also had proceeded against a respondent's competitors; in others it had not done so. Synopses of these decisions are set forth in Appendix C, *infra,* pp. 17a–18a. In other cases, it should be noted, the Commission has granted relief from its orders or dismissed complaints on the basis of intervening decisions involving a respondent's competitors. *E.g.,* *Plough, Inc.,* FTC Docket No. 8563, April 30, 1964 (dismissing complaint); *Towel Shop,* FTC Docket No. 7533, June 4, 1964 (modifying cease and desist order).

at 412). In the present case, respondent alleged only that it probably would suffer a substantial decline in sales; under *Niehoff* that claim *a fortiori* did not require the Commission to postpone its order.

If allowed to stand, the decision below would create a serious loophole in the strict rule enunciated in *Moog*.[9] By making its own initial finding as to the competitive situation in the industry and its own initial determination that truckload discounts should be considered on an industry-wide basis, the court below departed from this Court's holding that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically" (355 U.S. at 413). The exception permitting judicial review of Commission refusals to stay orders in cases of "patent" abuse of discretion is an extremely narrow one. If a "patent" abuse of discretion could be established by the mere claim that other members of the industry are engaged in the same practice and that failure to proceed also against them will subject the particular company against which the order is directed to economic injury, the way would be open for reviewing courts widely to substitute their judgment for the

[9] Even before *Moog*, parallel violations by competitors had never been viewed as a bar to the correction of illegal conduct. See *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U.S. 304, 308, 309, 312–313; *United States* v. *Wabash R.R. Co.*, 321 U.S. 403, 404; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999, 1004 (C.A. 7).

Commission's on a matter peculiarly within the agency's expertise.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1966.

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[10] The error of the court below in misapplying *Moog* is compounded by its failure to determine the validity of the Commission's cease-and-desist order before deciding whether to stay it. Sound judicial administration requires that the reviewing court decide the validity of an order before considering when it should become effective. For if an order is found invalid, there is no occasion to decide whether it should be stayed. Moreover, the decision below would result in a serious and unnecessary waste of the Commission's resources if, after lengthy industry-wide proceedings, the court of appeals were to rule that the agency's substantive theory is erroneous. Thus, even if the reviewing court were justified in staying the Commission's order—which it was not—the court should not have considered that question until it had first determined the validity of that order.

APPENDIX A

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order

terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 11 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1127, and by the Finality Act of 1959, 73 Stat. 243, 15 U.S.C. 21, provides in part:

(b) Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be

set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

* * * * *

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. * * *

* * * * *

(g) Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; * * *

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

NO. 14763 SEPTEMBER TERM, 1965 SEPTEMBER SESSION, 1965

UNIVERSAL-RUNDLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

October 22, 1965

On Petition To Review an Order of the Federal Trade Commission

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Universal-Rundle Corporation, a Delaware corporation, by its petition asks us to review and set aside an order of the Federal Trade Commission issued on June 12, 1964 and its order issued on August 4, 1964.[1]

Petitioner is a nationwide manufacturer, distributor and seller of plumbing supplies and equipment, including a complete line of "U-R" brand vitreous china and enameled cast-iron plumbing fixtures. In the sale of its products, petitioner has a wholesaler's net price and also a truckload price which is below the wholesaler's net list price. The truckload price is applicable only to the purchases of a truckload or

[1] At the conclusion of hearings, the examiner made an initial decision which was modified by the Commission's final order.

more of fixtures, and the Commission found that the differentials involved are those averaging 10% between truckload prices and the wholesaler's list prices. A truckload order may consist of any combination of fixtures and the discount rate on such truckload purchases varies from order to order, depending on the list and truckload prices of the individual fixtures at time of purchase. As to petitioner, the situation in Philadelphia, Pennsylvania, was that Mars Supply Company, a large dealer, was the only one which bought in truckloads. In 1957 its four truckload orders amounted to $23,251.23. At petitioner's wholesaler's net price Mars would have paid $25,795.53, indicating a preferential allowance or discount of about 9.9%. On the basis of such testimony the Commission found that Mars competed with nonfavored customers in Philadelphia through its main store and with nonfavored customers in Camden, New Jersey through its branch store, and also that Mars competed with nonfavored dealers in selling directly to the consumer.

The Commission found price discriminations were sufficient "to give the recipients of the lower prices a substantial advantage over their non-favored competitors" and that such discriminations may be substantially to affect customer competition adversely. In its opinion, and by adopting the examiner's decision as modified, the Commission found that competition in the resale of petitioner's "U–R" brand of plumbing fixtures was keen in the Philadelphia-Camden area; that price was a very important competitive factor in the plumbing-fixture business; that the differentials if reflected in the resale price of the products would have been sufficient to divert business from nonfavored customers to Mars; that the margin of

profit in the resale of plumbing fixtures appears to be small; and that a 2% cash discount was essential to a profitable operation. The Commission concluded that under the circumstances "competitive injury may be anticipated if [petitioner's] pricing practices with regard to the sale of its U–R line of products are allowed to continue," and that petitioner's discriminations violated Section 2(a) of the Clayton Act, as amended.

In this court the conflict between the legal theories of the parties may now be stated in abbreviated form.

Petitioner argues that the evidence showed a lack of competition at the retail level, which precludes a finding of a violation, and also that competition is not adversely affected as a result of price discrimination in a situation wherein all buyers are free to avail themselves of the lower prices if they desire to do so. It relies on the fact that the discounts in question were available to any purchaser buying in truckload quantities.

Petitioner further contends the failure of the "favored" buyer to avail itself of the discounts found to be discriminatory on a substantial portion of its purchase is not irrelevant, as it demonstrates the lack of competitive significance of the discounts themselves.

The argument is further advanced by petitioner that the finding of intense price competition at the "dealer" level leading to probable diversion is unsupported by, and contrary to, the evidence, and it is error to infer the probable competitive impact of a truckload discount by comparing it to a cash discount, because such discounts are entirely dissimilar in an economic sense, and that the amount of discrimination between competing purchasers is too insubstantial to support the finding of violation.

The Commission's final order of June 12, 1964 rejected the examiner's finding that petitioner's sales to its Camden, New Jersey customers were in interstate commerce, but in other respects agreed with the examiner and denied the appeal from his order. It modified the initial decision accordingly and then adopted it on June 12, 1964.

This action was promptly followed by petitioner's filing with the Commission on July 20, 1964 its petition requesting that further action be stayed to permit the Commission sufficient time to investigate and institute whatever proceedings are deemed appropriate by the Commission to correct an *industry-wide* practice by plumbing fixture manufacturers of granting discounts in prices on truckload shipments.

Petitioner there stated:

> * * * Such a stay, when followed by appropriate action by the Commission to place all manufacturers in this industry on the same competitive basis, would avoid the obvious competitive disadvantage and extreme hardship under which respondent [petitioner here] would otherwise have to compete and minimize the probability of any substantial decline in respondent's sales volume which would be a consequence of the Commission's order.

Accompanying the petition were written statements of facts and exhibits indicating that each of the following named competitors of petitioner operates its business on a discount and truckload purchase plan as does petitioner, with however an important exception as to the approximate amount of the aver-

age truckload discount allowed by each of said competitors, which the following list shows:

	Average discount allowed
American Standard[2]	18.0%
Eljer Division of The Murray Corporation of America	18.0%
Rheem Manufacturing Co.	17.5%
Briggs Manufacturing Company	13.0%
Kohler Co.	18.0%
Crane Co.	18.0%

Petitioner called the Commission's attention to the fact that this evidence shows that its competitors use price differentials *far in excess* of the average truckload discount granted by petitioner, as disclosed by the record in this proceeding.

The sworn petition for withdrawal of the order of the Commission also shows that the respective shares of the market enjoyed by the seven principal manufacturers of plumbing fixtures in the United States are, as follows:

1. American Radiator & Standard Sanitary Corporation	32.0%
2. Kohler Co.	15.0%
3. Eljer Division of The Murray Corporation of America	10.0%
4. Crane Co.	9.0%
5. Briggs Manufacturing Company	6.0%
6. Universal-Rundle Corporation	5.75%
7. Rheem Manufacturing Co.	5.0%

However, the petition of July 20, 1964 was denied on August 4, 1964.

It is apparent that the Commission has directed its attack against a general practice which is prevalent in the industry. However, it has not aimed at the entire industry or at any of the largest manufacturers in the group. It has selected one whose share of the market is less than 6%, although the practice complained of is common to the industry. The obvious

[2] It appears to be a division of American Radiator & Standard Sanitary Corporation.

injustice of this method of reaching an industry-wide problem lies, not only in the selection of one of the smallest participants marketwise as a target, but also in the fact that the target selected is charged with allowing an average truckload discount of 10% when its competitors are granting average truckload discounts running between 13% and 18%.

This inequitable approach to the solution of an antitrust problem, submitted to us because of the action of the Federal Trade Commission in centering this proceeding solely on petitioner, was unjustified. Its contrary determination was a patent abuse of discretion and must be overturned. *Moog Industries* v. *Federal Trade Commission,* 355 U.S. 411, 414. We cannot, in the name of an antitrust prosecution, lend our support to the sacrifice of a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted.

We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public.

No reason is apparent why the Commission did not bring in these larger competitors and seek a final decree covering all of them. They are not numerous. The industry is, according to the record, limited to a few. This case is thus distinguishable from *E. Edelmann & Co.* v. *Federal Trade Commission,* 7 Cir., 239 F. 2d 152 (1956); cert. denied 355 U.S. 941 (1958). Moreover, in that case it appears, at 156, that the discount system employed by petitioner Edelmann was not the same as that of its two principal competitors and Edelmann did not establish that its lower price was made in good faith to meet a competitor's equally low price.

The Commission now relies on *C. E. Niehoff & Co.* v. *Federal Trade Commission,* 241 F. 2d 37 (1957) where we stayed the effective date of a Commission order, under the circumstances of that case, and its subsequent reversal, *sub nom, Moog Industries* v. *Federal Trade Commission, supra.* While we had affirmed the Commission's determination of statutory violation, we directed that the cease and desist order should take effect "at such time in the future" as we might direct and hence our order was reversed, as aforesaid. The Supreme Court, at 414, recognized that, if the Commission had patently abused its discretion in determining that its order should not be held in abeyance until respondent's competitors were proceeded against, a court of appeals might overturn the Commission's determination. That is the situation now before us.

Counsel for the Commission admit in their brief in this court "petitioner submitted specific information to the Commission tending to show current violation of Section 2(a) by two of its competitors" and that it also was "conducting another investigation of one of the companies, which, *although not involving* Section 2 (a) of the *Clayton Act,* might indicate whether that section was being violated." (Italics added.) This brought about the investigation by the antitrust division of the Department of Justice of those two competitors.

In the case at bar, it appears that, by letter dated *April 19, 1965,* Commission counsel wrote to petitioner's counsel herein that the reason the Commission would not *then* undertake any industry-wide investigation of petitioner's competitors was that such an investigation "would conflict with an investigation *now* being conducted by the Antitrust Division of the

Department of Justice". We are not impressed by this reference to a belated investigation conducted in *1965* which was many months after the proceeding before the Commission occurred and the entry of the orders of the Commission which we are now reviewing. Even if not tardy, such an investigation by the Department of Justice does not qualify as an investigation by the Commission, which, in our opinion, was the agency which was called upon to act in all matters pertaining to the case at bar. We hold that the duty of the Commission to bring into the case before it petitioner's powerful competitors could not be excused or condoned by the Commission asserting, after it had by its order condemned petitioner, that a branch of the executive department of the government had commenced an investigation.

An investigation of an industry is germane to a proceeding before the Commission, and it has a duty to so investigate in a proper case. We have already indicated our view that petitioner's showing was sufficient to require the Commission to make petitioner's competitors parties thereto. The Commission was the proper forum to receive and act upon the result of such an investigation. Recently, in an address before the Bar Association of the District of Columbia, Commissioner Jones (of the present Commission) stated February 25, 1965:

> Industry-wide enforcement of the law is almost a constitutional imperative as a matter both of fairness and equality before the law. It is clear that we have no right to and could not permit some law violators to go free while prosecuting others. * * *

For the reasons herein set forth, the order of the Commission entered August 4, 1964 is set aside and this cause is remanded for further proceedings as

prayed in the petition of Universal-Rundle Corporation filed July 20, 1964. We reserve our ruling on the petition to set aside the final order of June 12, 1964.

ORDER OF AUGUST 4, 1964 SET ASIDE AND CAUSE REMANDED, WITH INSTRUCTIONS.

RULING RESERVED AS TO ORDER OF JUNE 12, 1964.

A true Copy:
Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Friday, October 22, 1965

Before Hon. F. RYAN DUFFY, Hon. ELMER J. SCHNACKENBERG, Hon. WIN G. KNOCH, *Circuit Judges.*

No. 14763

UNIVERSAL-RUNDLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for review of an order of the Federal Trade Commission

This cause came on to be heard on the petition for review of orders of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order of the Federal Trade Commission entered August 4, 1964, be, and the same is hereby set aside, and that this cause be, and the same is hereby REMANDED to the Federal Trade Commission for further proceedings as prayed in the petition of Universal-Rundle Corporation filed July 20, 1964, in accordance with the opinion of this Court filed this day.

This Court reserves ruling on the petition to set aside the final order of June 12, 1964.

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Friday, December 17, 1965

Before Hon. JOHN S. HASTINGS, *Chief Judge;* Hon. F. RYAN DUFFY, Hon. ELMER J. SCHNACKENBERG, Hon. WIN G. KNOCH, Hon. LATHAM CASTLE, Hon. ROGER J. KILEY, Hon. LUTHER M. SWYGERT, *Circuit Judges.*

No. 14763

UNIVERSAL-RUNDLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for review of an order of the Federal Trade Commission

IT IS ORDERED by the Court that the petition of the Federal Trade Commission for a rehearing *en banc* be, and the same is hereby DENIED.

(SWYGERT, C. J. voted to grant the petition for rehearing *en banc.*)

APPENDIX C

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS

FTC docket No.	Title	Date of order	Synopsis
8093	*Chun King Sales, Inc.*	3- 4-64	Robinson-Patman case. The Commission denied respondent's motion to reopen, to vacate a cease-and-desist order or to stay the effective date of the order until such time as "its effect will not be to place respondent in an inequitable position competitively in the sale and distribution of the products covered by the order." Respondent alleged that "In the Oriental foods industry there are some sixteen competitors of varying sizes * * *."
7817	*United Biscuit Company of America.*	4-10-64	Robinson-Patman case. The Commission denied respondent's motion to withdraw and stay re-entry of its order "until a determination has been made as to whether the respondents in *National Biscuit Company*, Docket No. 5013, and *Sunshine Biscuits, Inc.*, Docket No. 6191, are in compliance with the respective cease and desist orders issued previously by the Commission against these companies."
8596	*Watchbands, Inc., et al.*	5-21-64	The Commission denied respondents' motion to vacate their default and to reinstate the case for trial on the merits, a cease and desist order having been issued on February 3, 1964. Respondents alleged, among other things, that "there are a number of manufacturers engaged in the watchband industry who are much larger manufacturers who have not been directed to cease and desist their importation of watchbands with the resultant discrimination against the respondent."
7462	*Pacific Molasses Company.*	7-20-64	Robinson-Patman case. The Commission denied respondent's request to reopen the proceedings on the ground, *inter alia*, that the order should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which was under a somewhat similar Commission order, had left the business and had been replaced by National Molasses Company, "against whom there is no cease and desist order."

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS—Continued

FTC docket No.	Title	Date of order	Synopsis
7566	*Southern Fruit Distributors, Inc.*	3-11-65	Robinson-Patman case. The Commission denied respondent's petition to reopen, which was based on the Commission's decision in two other cases and the fact that "the continuation in force of this consent cease and desist order puts Southern Fruit at a real disadvantage vis-à-vis a competing company."
C-788	*Lafayette Radio Electronics Corp.*	3-24-65	The Commission denied respondent's motion to suspend the effectiveness of a consent order until similar orders are issued and become effective against three competitors.
8656	*Texas Industries, Inc.*	4-14-65	The Commission denied respondents' motions "to suspend the proceeding pending completion of an industry-wide investigation, inquiry, or other action by the Commission."
8657	*Mississippi River Fuel Corporation.*		
6048	*Schenley Industries, Inc., et al.*	10-25-65	The Commission denied respondents' petition to reopen based on the contention, among others, that respondents' "competitors are not under similar restrictions."
8038-A	*Graber Manufacturing Co., Inc., et al.*	12-13-65	Robinson-Patman case. The Commission denied respondents' motion to dismiss or suspend the proceedings, in which the respondents pleaded, among other things, that the Commission has issued a complaint in another, more comprehensive, action "involving in essence the very factors upon which liability is premised against the respondents herein."
C-607	*Dexcon Corporation, et al.*	1-19-66	The Commission denied respondents' motion, which contended in essence that the Commission's promulgation of Guides Against Deceptive Labeling and Advertising of Adhesive Compositions indicated an intention to deal with the matters involved on an industry-wide, voluntary-compliance basis, and that it would be inequitable to place respondents alone under an order before determining whether the industry guides would secure compliance.
File 661-0606	*Lehigh Portland Cement Company.*	3-3-66	The Commission denied (1) respondent's petitions to expedite the Commission's industry-wide inquiry and, pending promulgation of a policy to guide the industry, (2) to stay further action in the particular case.

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